DOCUMENT RESUME

ED 159 500 CG 012 668

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TITLE Staff Liability in Student Personnel Administration.
PUB DATE [75]
NOTE 19p.

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS *Administrator Responsibility; *Contracts; Higher Education; *Legal Responsibility; Legislation; *Performance Specifications; Personnel Directors; Postsecondary Education; Role Conflict; State of the Art Reviews; *Student Personnel Workers; *Torts

ABSTRACT

Student Personnel Administrators in institutions of postsecondary education share a common characteristic and experience a common fear related to their potential personal and institutional liability under the law for acts committed while carrying out their official duties. This article seeks to inform administrators of the parameters of the liability that they face and to discuss the ways in which they can manage this liability most effectively. There are two general types of liability: criminal liability and civil liability. Because student personnel administrators have primarily a concern for civil liability, the article presents discussion of the sub-categories of this problem area--contract, tort, and breach of fiduciary duty. Student personnel administrators have a personal, as well as an institutional liability. They must be knowledgeable of the scope of their liability so they can make decisions that are truly in the best interests of the students and the institution they serve. (Author/JEL)

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STAFF LIABILITY IN STUDENT PERSONNEL ADMINISTRATION

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Student Personnel Administrators in institutions of postsecondary education share a common characteristic and experience a common fear related to their potential personal and institutional liability under the law for acts committed while carrying out their official duties. This fear, generated by the unknown, has caused paramount concern the last six years. The purpose of this article is to inform administrators of the parameters of the liability that they face and to discuss the ways in which they can manage this liability most effectively.

Before starting our analysis of the various kinds of potential liability that exist, the difference between the public and private sector of postsecondary education has to be studied. In general, this area is quite confused. In Spark v. The Catholic University of America we find the court discussing some of the kinds of potential liability that exist between the public and private sectors, in that constitutional protections will be extended only where the government is sufficiently involved - the state action question. But even in cases where the state is clearly involved, for example, the University of Delaware, the courts have found that this public institution is really not public in nature because it doesn't hold property directly. In another instance the University of Syracuse, traditionally a private institution, was judged by the courts to be performing a public function and therefore the question of liability was considered within the scope of state action.

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If the liability suit involves a student, the question of state action is immaterial since there is a contractual relationship between the student and the institution. This definition of the student institutional relationship was first offered in Booker v. Grand Rapids Medical College in 1909. From that point until the sixties, the courts were reluctant to regularly apply contract theory because of the "minor status" of most students, Ryan v. Hofstra University. With the change in the age of majority and in the age for entering into contracts, this reluctance has disappeared, Zumbrun v. University of Southern California. In the final analysis the legal implications of contract theory are shared equally by administrators of both public and private institutions.*

There are two general types of liability. The first of these is criminal liability. The specific type of criminal liability involved in a given case would vary from state to state because each has its own criminal code or common law of crime. But generally a crime is defined to be an act coupled with a criminal intent. Thus it would be a crime to take funds or property of an institution of postsecondary education with the intent of keeping it. For example, a Student Affairs staff member who would take some extra tickets for a concert or a play would be criminally liable. The necessary criminal intent can best be defined as the intent to do physical or financial injury to another in a manner reasonably certain to accomplish that result. Should a student personnel administrator come within this general definition of criminal intent coupled with the forbidden act as in the example above, such activity would undoubtedly be a crime under criminal code or common law of most states.

*(For more complete explanation see "Understanding the Parameters of Academic Fraud," NASPA Journal, Vol.13, No.2, Fall 1975)

However, these cases of direct involvement in criminal activity are quite rare within the student personnel profession. But in some cases one can be considered to have had the forbidden criminal intent simply by being negligent or unaware of what is going on. If a student personnel administrator is in a position to know that others around him/her, including students, are committing a crime and the professional unwittingly renders assistance, such an individual may be considered as guilty as the principals involved in the illegal activity. It is important in this situation that if the individual has been exercising reasonable prudence, the professional staff member would have known that there was some assistance in the commission of the crime. In such circumstances the law may imply a criminal intent and punish the individual for the unreasonable negligent conduct.

The second general area of liability is civil in nature. Although there is not a great deal of judicial background in this area, the last several years clearly indicate definite development of principles of law in the area of civil liability. Historically, the injured party would bring their case of action directly against the institution and not name officials as defendants. But under current legal practice it is becoming the rule not the exception for the aggrieved plaintiff to bring the case of action not only against the institution but against the administrators involved in the incident. This practice means that student personnel administrators at colleges and universities will find themselves facing personal legal liability because of their positions more often in the future than in the past. Civil liability, unlike criminal liability, has more generally applicable concepts to the student personnel profession. While many states have codified

their criminal laws, often their civil laws remain dependent on uncodified common law concepts that have been in existence for centuries. It is, therefore, a greater utility to discuss the potential areas of civil liability for student personnel administrators.

The area of civil law is based on one fundamental principle: if a professional through his/her actions in some way harms another or fails to perform a duty that was required to be performed, the professional should be required to pay the damages that has been caused by the action. This payment is often in the form of monetary damages to the injured party rather than fine or imprisonment. Because of this overriding principle, it is more possible for the civil law than criminal law to fashion liabilities for purposes of compensating the injured party.

Because student personnel administrators have primarily a concern for civil liability, the remainder of this article will be spent in discussing the sub-categories of that problem area. The key to effectively managing the question of liability within the profession has to do with the ability of the administrators to predict what is going to happen before it happens. This is made necessary by the acceptance of the concept referred to as "Respondeat Superior" which means that the employer institution of postsecondary education is going to be held responsible for the actions or negative torts of its employee. So in almost all cases there is a joint liability for the professional and for the institution where he/she is employed.

The first area of civil liability that we are going to analyze is contained in the concept of contract. Contract liability is monetary damages assessed against a party that fails to perform a duty guaranteed

under a contract to compensate the other party or parties to the contract for the resulting loss. Most, if not all, contracts made on behalf of a college or university are made by the institution directly with an official signing on the institution's behalf. The question then is, to what extent can the official who executes a contract on behalf of an institution be held personally liable if the institution fails to perform its obligations? The answer to this very difficult and complex question is that, assuming the contract was properly executed, such personal liability would rarely result. It has long been recognized that corporate officials can sign a contract for the corporation and not be personally liable. This doctrine carries over to institutions of postsecondary education, including those not incorporated but existing as identifiable public entities created either by action of the state legislature or local government. The reason for this is that such entities can act only through agents, and to assess personal responsibility against their agents would act to defer individuals from taking responsibility to act on behalf of the institutions.

It is important to note however that the contract be signed by the professional in his capacity as an official of the institution and not in his individual capacity. It is clear that a college official can sign a contract and be personally liable if he signs it in his individual capacity. In this way the official would become the guarantor of the college's performance under the contract. If the institution does not perform in accordance with the terms and conditions of the agreement, the aggravated party could seek redress directly against the official who signed the contract in his individual capacity. In signing

any contract and presumably seeking to avoid personal liability, the student personnel administrator should utilize language in connection with his/her signature which specifies that the professional is signing in the capacity of an official of the institution and not in a personal capacity.

Even where the administrator did not sign the contract, there have been attempts to hold him personally responsible. One such attempt is represented in a North Dakota case of Gottschalch v. Shepperd where a faculty member tried to hold the state college's administration and board personally liable for breach of contract. In this case the court held as a matter of law that the board was not liable even though it may have acted prematurely in terminating the faculty member's employment. The important point in this case is that even though an administrator may have acted prematurely, the court did not hold them personally liable for breach of contract if it was clear they were acting in their official capacity,or if there is no official connection with the contract but the suit named them as defendants because of their administrative position.

While it may be true as a matter of law that administrators of colleges and universities are not liable for losses due to breach of contract by the institution as reviewed above, new non-contract theories have been utilized recently to hold the college officials liable for what amounts to the institution's breach of contract. One example is an academic fraud case, Zumbrun v. The University of Southern California, where a student filed suit against the institution, the Board of Trustees, and a faculty member for breach of its fiduciary duties, unjust enrichment, punitive damage, and other relief. As damages, the plaintiff alleged that she was entitled to recover tuition

and fees paid for the course in question, $5,000 in loss of income and $60,000 in potential loss of future income. It is clear that, despite the fact the student in the case labeled a theory on which she based her claim somewhat differently, the foundation of her action was the failure of the faculty member to carry out the contractual obligation of the institution to teach the course for which the institution advertised and the plaintiff paid.

Initially the trial court dismissed the case, but on appeal the reviewing court noted that there existed a contractual obligation incumbent upon all of the defendants to give a stated number of lectures, cover the material listed in the course description, and present a final exam. The appeals court reversed the lower court's decision and directed the plaintiff to give an opportunity to the student to prove her allegations. Thus, despite the rather strong statements that the court made in the Gottschalch case, that administrators of an institution are not liable for the institution's breach of contract, Zumbrun at least indicates that they may be in certain circumstances. How far the courts are prepared to go with this type of analysis is not clear. The emerging doctrine may be, that while such administrators and faculty are not personally liable, they are incidently participants in the institution's breach of contract, and they may find themselves personally liable where they have been the driving force behind preventing their institution from fulfilling its contractual obligations.

It is in this context that the 1975 case of Endress v. Brookdale College may be considered. In this instance, the Board of Trustees

terminated the services of a non-tenured faculty member for writing an editorial in the student newspaper accusing the Chairman of the Board of conflict of interest. The faculty member has brought suit seeking the institution to fulfill its contract and asking for damages for malice that the institution has caused. The court in making its decision and awarding compensation and punitive damages against individual administrators and board members, said, "After noting that the faculty member suffered the shame and mental anguish of being summarily terminated without the opportunity to give her side of the controversy, punitive damages are absolutely necessary to impress upon the people who are in authority that employees' constitutional rights may not be infringed." This area of law is in flux and further refinements will no doubt become available as this case is appealed.

The second area of civil liability is that of tort liability. A tort is an unprivileged interference with another individual in such a manner as to cause injury to that party. Such interference may be intentional as in the case of an assault and battery, or unintentional as in the case of negligence. Regardless of whether or not there was intent or not, tort liability exists. There have been many reported cases where an injured party has attempted to hold a college or university official personally liable for either the torts they committed while acting in their official capacity, or the torts of other officials of the institution generally. One such instance is the case of Gambet v. Vanderbilt University where the student, who was injured in the fall of an elevator in a building of the University, attempted to hold the members of the executive committee of the University personally liable for the injury suffered. The executive committee was charged with

responsibility for supervision of the building. The court held that the injuries were caused by the committee's negligence to perform its duties with respect to the upkeep of the building. It also appeared from the evidence that the committee knew that the elevator was unsafe but permitted its use despite that knowledge. On this basis the court held the members of the committee personally responsible and liable for damages suffered by the injured student.

After 1938, the defense that administrators of postsecondary education could not be held personally liable because they were acting as agents of the institution was affirmed in the case of Scott v. Burton. In this case the trustees of a private college were held not to be personally liable to a student for injuries sustained in the student's jumping from an alleged negligently constructed and maintained dormitory to escape fire. The court noted that the administrators and trustees has nothing to do with the construction of the building and there was no evidence that they knew of the claimed dangerous condition. In a more recent case, Norse v. Noustry, the dean, assistant dean and physicians of the state university were held to be liable to a student for ordering him off campus and giving out information about his mental condition. The court held that the actions of the student affairs administrators were consistent with their duties of policing the grounds and protecting students from improper influences. It must be noted that this case preceded the implementation of the right of privacy legislation.

It is clear that some courts are willing to hold student personnel administrators liable in circumstances similar to those in Norse. This is particularly true when the official has participated in the activity causing the injury. How far beyond this the courts would be willing to extend personal liability doctrine is not certain at this time. It is

unlikely that any court will impose liability on a college or university administrator for torts in which he did not personally participate, or in which he did not have nor should have had knowledge.

The third general area of civil liability is that which involves a breach of fiduciary duty. This area can best be defined as being the duty or responsibility incumbent on administrators to act in the best interest of their institutions and not in their own or someone else's when a possible conflict of interest arises. History records few cases ascerting personal liability for breach of fiduciary duty by an official of an institution of postsecondary education. When there is such a breach, generally any one individual suffers little, and prior to 1938 legal action was unlikely because of financial considerations. For example, assuming that a student affairs administrator of an institution was also an agent for a rock group and caused the institution to enter into a contract at a higher price than the market rate, that administrator has breached his fiduciary duty. The increase in cost to each student and others would be very small when spread over the total community, thereby alleviating the likelihood of a lawsuit. In recent times legal action has become worthwhile with the advent of class action suits. Now it is possible for one individual to sue for the financial damages caused the entire class of aggrieved individuals and upon collection, each is given his/her proper share of recovery.

In 1974, the courts handed down the key decision in this area of liability, Stern v. Lucy Webb Hayes National Training School for Deacons and Missionaries. The plaintiff institution had built Sibley Memorial Hospital in Washington, D.C. Other defendants were past or present trustees of the hospital. The two principal contentions of the plaintiff

were that the defendant trustees conspired to enrich themselves in certain financial institutions which they were affiliated with by favoring those institutions in the handling of hospital finances and that they breached their fiduciary duties in the management of the hospital funds. The court, in a particularly useful review of the law in this area, noted that an administrator of an institution is in breach of his fiduciary duty to manage the affairs of the institution if it can be shown that,(1) While assigned to a particular committee of the institution having general financial or investment responsibilities under the bylaws of the corporation, the individual has failed to use due diligence in supervising the actions of those officers, employees or outside experts to whom the responsibility for making day to day financial or investment decisions have been delegated; or(2) the administrator knowingly permitted the institution to enter into business transactions with himself or with a corporation, partnership, or association, in which he had a substantial interest or held a position as trustee, director, general manager, or principal officer, without having previously informed the person charged with approving the transaction of his interest or position and of any significant reasons, unknown to or by such persons, why the transaction may not be in the best interests of the institution; or(3) except as required by the preceding paragraph, the administrator actively participated in or voted in favor of a decision by the board or any committee or subcommittee thereof to transact business with himself or with any corporation, partnership, or association in which he then had a substantial interest or held a position as a trustee, director, general manager, principal officer, or (4) he otherwise failed to perform his duties honestly, in good faith, with a reasonable amount of diligent care.

Applying the above standards, the court found that the facts presented that the defendant and the trustees breached their fiduciary duty to supervise and manage the hospital investments. The court also set out a covenant which applied with equal force to trustees and administrators of all institutions of postsecondary education. "AN ADMINISTRATOR OR TRUSTEE OF A CHARITABLE OR NOT-FOR-PROFIT INSTITUTION SHALL ALWAYS AVOID ACTIVE PARTICIPATION IN A TRANSACTION IN WHICH HE OR A CORPORATION WITH WHICH HE IS ASSOCIATED HAS SIGNIFICANT INTEREST."

Liability for breach of fiduciary duty has existed in the law for hundreds of years. The Stern case keenly illustrates how the merger of breach of fiduciary duty liability with class action suits has caused new potential for individual suits against student personnel administrators. Although the individual plaintiff in Stern suffered little, by permitting him to sue for his losses and that of others similarly situated, the law has effectively prescribed a sufficient deterrent to the mishandling of delegated duties by those entrusted with official responsibilities. Student affairs administrators of colleges and universities must be keenly aware of this potential and guide their actions and their efforts accordingly. Whenever a matter comes before an administrator of an institution of postsecondary education in which the official has personal interest as well as an official interest, the administrator would be well advised to disqualify himself from the decision-making process. If such disqualification is impossible, the official must draw a very clear line between his official interest and his personal interest and allow only his official interest to lead him to a decision. Where possible, an official written record should be made of the basis on which the official relied in making his decision.

Although such a record would be by no means conclusive, it would be valuable evidence in any lawsuit which involved the transaction.

The possible overuse of class action suits has been curtailed by a series of recent cases known as Eisen, I, II, III, that declared that official notification must be made by mail to all alleged plaintiffs in this type of action. This change in the procedures involving class action suits has made it extremely expensive for defendants to pursue an alleged violator of fiduciary duty in a casual manner. Even though this change may limit in years to come the number of class action suits, it is extremely clear that the application of this type of litigation will be used by students if administrators compromise their fiduciary duty.

There are a number of other areas of discussion which should be covered to thoroughly understand the question of staff liability. One of these peripheral areas is the doctrine of "sovereign immunity." Since early common law, and possibly since the beginning of Roman law, it has been a basic principle that one who has suffered a loss due to governmental action could not recover from the loss in court. This doctrine was originally founded in the concept of the divine right of kings, that the king can do no wrong. Although the United States has forsaken the rule by kings and queens, for much of its history it has never felt obligated to break away from this legal concept. To what degree this doctrine, which shields various government units from liability, acts also to shield government agents such as officials from institutions of postsecondary education is an interesting question. The number of cases recently involving administrators in institutions where plaintiffs have been successful lead one to conclude that the doctrine

cannot be relied upon with any degree of confidence. There is a growing tendency for the courts to skirt the doctrine by permitting relief normally against government officials in their individual capacity. The theory relied upon here is that a government official is acting outside the scope of his authority and discretion when he commits a wrongful act. Common law may provide immunity from damages for trustees and administrators of state institutions who act wrongfully or even unconstitutionally where they did so in unquestionably good faith and in perfect accord with long-standing legal principles, Kirstein v. Rector and Visitors of the University of Virginia.

As the doctrine has been refined in scope it now appears to be the rule that government officials are responsible for the mishandling of their responsibilities but not for the discretionary ones, unless they are found to have exceeded the bounds of their discretion. Administrators areas of responsibility are generally defined as those which must be done as a matter of course by virtue of occupying the office alone. Where there exists discretion as to whether a certain act should be performed, or a reasonable method for doing it, no civil liability may be asserted unless there is an abuse of discretion. Much of governmental sovereign immunity is now governed by statutes of the various states. Often the standards and applications of the doctrine of sovereign immunity vary greatly from jurisdiction to jurisdiction.

For an example of this variance, in California government officials can be held liable for torts committed within the scope of their official duties whether those duties be ministerial or discretionary. Kansas and Georgia laws state that the doctrine does not apply to officials of lower rank where the official does not act honestly and in good faith but instead acts maliciously or for an an improper purpose.

Other states, such as Vermont and Minnesota, refuse to allow this particular diversion from the general rule. These examples indicate the variance existing between the laws of different jurisdictions and the inadequacy of any attempt to speculate on the degree in which the doctrine of sovereign immunity will protect a college or university administrator. The doctrine has been much criticized and the courts are becoming more reluctant to rely on it as a basis for decisions. In fact, a number of the states are doing away with sovereign immunity, including the states of New Mexico, New York, Indiana, Wisconsin, Ohio - the latter in the liability suits arising out of the Kent State student deaths.

A second peripheral area of staff liability deals with the violation of the Civil Rights Act of 1866. In 1975. the court decided in Wood v. Strickland that liability may be found if "the administrator knew or reasonably could have known that the action he took within his sphere of official responsibility would violate the basic unquestionable rights of the students effected, or if he took the action with the malicious intent to cause a deprivation of constitutional rights or other injury to the students." Because of this case there is no question that if an administrator knowingly takes action that denies a student the constitutional right guaranteed to him/her, the administrator is personally liable. We are just beginning to see more litigation in this area as a result of this decision.

In summary, student personnel administrators have a personal liability as well as an institutional liability that must be managed. Every institution of postsecondary education should be covered by a comprehensive general liability policy which protects not only its

student affairs administrators but all the administrators at the institution. If possible, this policy could contain a personal injury rider which would increase projection in this critical area. Second, each administrator should make sure that when they enter into a contractual agreement there is no question that this agreement is entered into on behalf of the institution and that their signature does not represent an individual commitment. Lastly, it is important that all administrators within the student affairs area become knowledgeable of the scope of their liability. Only with such knowledge can decisions be made that are truly in the best interests of the students and the institution that they serve.

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